In the Kentucky Court of Appeals, October, 1858.

S. S. THOMPSON, APPELLANT *against* W. L. VANCE, APPELLEE.

Where A made to B a deed of gift, embracing both personalty and realty, in which deed was a special power in the nature of an appointment, which B executed by his last will according to the terms of the power: Held, that the wife was not entitled to dower in the realty so conveyed by deed of gift.

The opinion of the court was delivered by

DUVAL, J.—George Thompson was the owner of a large estate, consisting chiefly of land and slaves in the county of Mercer. George C. Thompson was his only child; the latter had been married three times in the lifetime of his father, and had made his father's house the home of himself and his family. It appears that George Thompson had never given his son any part of his estate, and that this circumstance occasioned such dissatisfaction on the part of his son's third wife, who is the appellant in this case; that she, after the birth of two children, determined to return to her father's house with her children in the winter of 1823 and '24, and there remained during the session of the legislature, of which her husband was then a member. To induce her to return, and to remove the cause of the difficulty between her and her husband, George Thompson, on the 19th of January, 1824, executed to his son, G. C. Thompson, a deed for over one thousand acres of valuable land, and about fifty slaves. He at the same time wrote a letter to his son, informing him of the gift, and of his intention to give him more at a future period, and stating also his intention to build another residence on another part of his land, either for himself or his son, as might be afterwards determined.

Mrs. Thompson thereupon agreed to return, and did return with her husband to their former home. George Thompson, in accordance with the intention expressed in the letter referred to, went on to build another residence at a place called "Pleasant Fields," to which he removed, leaving his son George and his family in posses-

sion of the old homestead, called "Shawanee Springs." On the 5th of August, 1825, which was about the time of his removal, George Thompson executed to his son a deed of conveyance for the Shawanee Springs tract of land, which deed, after describing the tract of land by metes and bounds, contains the following provision: "To be held, occupied, used, and employed by *him, during his life;* and he is further, if he deems it proper during his life, to transfer and convey to any one or more of his posterity, the whole or any part or parts of said tract of land at his pleasure; and at the death of said G. C. Thompson the said land, in the whole or in parts, is to be vested in his posterity, or such of them, one or more, as he may select, choose, and direct by his last will, should he not have done it in his lifetime by deed. And the said G. C. Thompson is also at liberty, and is hereby vested with the right, if he thinks proper so to do, by his last will and testament, to vest in any widow he may leave, an estate in said land, or any part thereof, not to extend to a greater or better estate than during her remaining his widow; but the same is never to be the dower of his widow, or any part thereof, or subject, under any circumstances, to the claim of dower by said widow."

Afterwards, on the 22d June, 1830, he also executed to his son a conveyance for about fifty slaves, which contains the following provision:

"The said slaves and their increase to be had, held, and used by my said son, G. C. Thompson, for his own use and benefit during his natural life, and after his death to go to, and be divided among the children, or any one or more of the children or grandchildren of my said son, in such manner and proportions to each, and under such limitations and restrictions as to title, as my said son shall, at his discretion, choose and think proper, to be expressed and directed by my son, by any will or other instrument of writing by him executed, for any part thereof, to be given and disposed of by my said son in his lifetime, at his discretion, among his posterity as aforesaid; and if my said son shall choose and think proper to sell any one or more of said slaves, he is hereby authorized to do so,

without being in any way accountable to his children, in consequence thereof, or for the purchase money, or he may exchange any one or more of them for other slaves, taking the bill or bills of sale, at his discretion, conveying a title with the same limitations as those contained in the present deed of gift; and my son is also fully authorized to bind any or all of the slaves aforesaid, or any of their increase, to any widow he may leave at his decease, to her use, for any length of time he may choose, not exceeding the term of her widowhood, subject, at the expiration of said lease, to the distribution which my son may direct, as aforesaid, among any one or more of his posterity. But it is clearly understood, that in no event whatsoever are any of the said slaves or their increase to be ever subject to a claim of dower by any widow which my son may leave at his decease; and the conveyance and gift are upon this express condition, and under this limitation."

Both deeds were recorded in March, 1851. G. C. Thompson, the grantor, continued in the possession of the land and slaves thus conveyed until his death, which occurred in 1856. He left a will, in which he made some provision for his wife, and executed the power conferred by the deed, by devising the land and slaves to his children, but declined leaving any part of either to his wife during widowhood. The widow renounced the provision of the will, and retained the possession of the mansion house and premises, claiming the right to do so. The appellee then filed this petition, seeking to have dower allotted to the appellant, in the land and slaves embraced by the deed of January, 1824, and in other lands in which they admitted she was entitled to dower, and seeking also a settlement and distribution of the estate of their father. They claimed that the appellant was not entitled to dower in the land or slaves embraced in the deeds of 6th August, 1825, and 22d June, 1830.

The appellant answered, claiming that she was entitled to dower in the land and slaves conveyed by those two deeds, basing her claims chiefly upon these grounds: that her late husband held the land and slaves in contest, not under those deeds, but as the heir-

at-law of his father, George Thompson, and that he had so held them for such a length of time as to vest in him an absolute estate in fee, of which she was by law endowable; and, second, that the two *deeds* were devised, executed, and accepted by the parties, for the fraudulent purpose and with the fraudulent intent to deprive her of her right of dower. The court below, upon final hearing, decided against her claim to dower in the estate embraced in the two deeds referred to; and she has prosecuted this appeal, insisting upon a reversal of the judgment, upon the grounds relied upon in her answer, and upon the additional ground that the deeds themselves must be construed as vesting in the grantee an estate which is by law subject to dower.

We proceed to consider, briefly, several questions thus presented, and first as it respects the manner in which this estate was held by G. C. Thompson in his lifetime; it appears that his father lived about nine years after the execution of the deed of 1825, and four years after that of 1830. During this period then, the son unquestionably held the land under the title created by the deeds, for he certainly was not the *heir* of his father in the lifetime of the latter, and could not therefore have held it as such. Did he renounce or repudiate this title, or set up any adverse claim, or profess to hold adversely to it, after his father's death? The record contains no proof of his having done either; on the other hand the testimony shows conclusively that the deed of 1825 was accepted by the grantee, and that he never pretended to claim the land under any other title. The deed was kept from record by the most obvious motives, and in accordance with the suggestions of the family lawyer, who informed the parties that their failure to record would in nowise affect its validity as to them. And that it was the intention and settled purpose of both parties that the deeds should be recorded at a future and proper time, is also clearly established by the testimony and the argument, which attempts to show that the father and son had agreed that the latter was to have the privilege of destroying the deed, and of claiming the land against its provisions, and as heirs at law, is founded upon the merest assumption, and is opposed to all the facts and circumstances of the case.

The execution and existence of the deeds were known to many persons in the family and out of it; they invested the children of the grantee with interests of which they could not have been divested by any such agreement, and the deed of the land is expressly referred to in the will of G. Thompson.

The destruction of the deed by the grantee would therefore have amounted to nothing; it would neither have enlarged his own estate, nor would it have destroyed or impaired the remainder interest of the children. But there is no proof that anything of the sort was agreed upon, or was ever intended or contemplated by either of the parties. At what precise period of time G. C. Thompson acquired the possession of the slaves embraced in the deed of 1830, does not certainly appear from the proof, and therefore some doubt whether he had held them for four years previously to the execution of that deed, or for a shorter period. But these are matters wholly immaterial to the questions before us. It is not denied that the slaves were held and claimed by George C. Thompson under his father, and it is equally clear, we think, upon this record, that he continued to hold them up to the date of the deed as the bailee of and under a loan from his father. He united with his father in the execution of that deed, and he, and all claiming under him, were ever afterwards estopped to deny the provision title of the grantor, or to set up any claim inconsistent with the title conferred by the deed to which George C. Thompson was a party, and which limited his interest in the slaves to a life estate merely.

Second. In regard to the alleged fraud in the execution of the deeds in question, we need only say, that the proof wholly fails to support the charge so often reiterated in the answer of the appellant, and the argument of the counsel. What rights had she in the estate owned by George Thompson, of which she could have been defrauded by any disposition he may have chosen to make of it. The property was his own absolutely—neither she nor her husband had a shadow of legal right to any part of it; and if he had chosen by deed or devise to give the whole to a stranger she would have had the same ground to question such disposition as she has for impeaching these conveyances to his son. The whole ground of complaint

in the one case or in the other, would have amounted to nothing more than that George Thompson had failed to confer upon either her husband or herself such an interest in his estate as he had power to do, and might have done.

The charge of fraud is considered utterly groundless.

Third. The remaining question relates to the construction and effect of the two deeds. What estate do they confer upon the grantee, G. C. Thompson? In the deed for the land, the language is "to be held, occupied and used and employed by him *during his life*," and in the deed for the slaves it is "to be held and used by my said son, G. C. Thompson, for his own use and benefit *during his natural life.*" These expressions clearly define the estate and interest with which the grantee was invested. That estate and interest is strictly and explicitly limited to a *life estate*, and there is nothing else contained in either deed which can be construed as operating to enlarge it, for between the estate thus limited to the grantee and the *powers* created and defined by the subsequent provisions, there is an obvious distinction, and when, as in this case, the powers are restricted to particular objects, they can never be so executed by the holder or donee as to make himself the beneficiary, as he might do if the powers were general. In the dispositions which G. C. Thompson was authorized to make of the property embraced by both deeds, he was expressly confined and restricted to his posterity. It is true that he was authorized to sell or exchange the slaves, for the proceeds of which he was not to be held liable to his children. Yet he was not authorized to *give* them, except to his posterity, nor to emancipate them; and this restriction upon the right of disposition reduces the power from a general to a special or particular power. But even if the power conferred by the deed had been general, and had authorized the grantee to dispose of the property at his discretion, still the life estate to which the power was annexed would not have been enlarged into a fee simple estate. This is well settled by the authorities. "A devise to A, for life expressly," (as in this case,) "with remainder to such persons as he shall by deed or will appoint, will, of course, not give him the absolute interest, although he may acquire it by the

exercise of his power." (Sugden on Powers, 99.) And if in such case A should die before making an appointment to himself under the power, his widow would not be entitled to dower. A case still stronger against the right of the wife, is stated by the same author elsewhere. He says, "that if an estate is limited to such uses as A shall appoint and until appointment to A and his heirs in fee simple, an appointment by A will cut off the right of dower of A's wife, which attached in the fee vested in him until he does appoint." (P. 337.)

Whenever a *power* is clearly intended to be given, the devisee cannot be regarded as taking the fee. Thus in the case of *Collins* vs. *Carlysle*, 7 B. Monr. 14. The devise was in these words: "the balance of my estate, wholly, I leave to my beloved wife, Nancy Carlysle, and to be disposed of by her, and divided among my children at her discretion." It was held that she took but a life estate, and having died without fully executing the power, her children took the estate not as heirs, but under the will. The same principle is settled in the case of *McGaughey's administrator* vs. *Henry*, 15 B. Monr. 383. But we deem it unnecessary to multiply the citations of authorities upon this point, feeling satisfied that under any admissible construction of the deed under consideration, George C. Thompson must be regarded as having been entitled to a life estate only in the property conveyed by them, and that his widow, the appellant, was not entitled to dower either in the land or slaves.

The judgment therefore is *affirmed*.[1]

[1] Query—would not the law have been held otherwise as to the deed of gift of the slaves in most, or all of the other States? See 10 Yerg. 290; 2 Swan, 620—Id. 112; 10 Johnson, 19; 10 Pick. 507.—*Note by the Reporter.*